IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

THURSDAY, THE 26TH JULY 2007 / 4TH SRAVANA 1929

WP(C).No. 21923 of 2005(I)

OS.185/1997 of MUNSIFF COURT, KOTTARAKKARA

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PETITIONER:

RAJEEV, S/O.BHASKARAN,
RESIDING AT THULASIMANDIRAM,
CHADAYAMANGALAM MURI, CHADAYAMANGALAM VILLAGE,
KOTTARAKKARA.

BY ADV. SRI.T.K.MARTHANDAN UNNITHAN
SRI.V.JAYAKUMAR
SRI.K.P.UNNIKRISHNAN

RESPONDENTS:

1. GOPALAKRISHNA PILLAI,
VIJAYA BHAVAN, PUNNAMOODU,
VARKALA VILLAGE, CHIRAYINKEEZHU TALUK.

2. PRASANNA KUMARI, D/O.CHELLAMMA,
ASWATHY, CHADAYAMANGALAM MURI,
CHADAYAMANGALAM VILLAGE, KOLLAM DISTRICT.

BY ADV. SRI.ALEXANDER GEORGE FOR R1
SRI.DILIP MOHAN
GOVERNMENT PLEADER

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 26/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: COPY OF SALE DEED NO. 3485/1996 DTD. 20.8.1996 OF CHADAYAMANGALAM SUB REGISTRY OFFICE.

EXT.P2: COPY OF TAX RECEIPT DTD. 24.8.2000 ISSUED FROM THE VILLAGE OFFICE, CHADAYAMANGALAM.

EXT.P3: COPY OF TAX RECEIPT DTD. 20.1.2004 ISSUED FROM THE VILLAGE OFFICE, CHADAYAMANGALAM.

EXT.P4: POSSESSION CERTIFICATE DTD. 20.1.2004 ISSUED FROM THE VILLAGE OFFICE, CHADAYAMANGALAM.

EXT.P5: COPY OF JUDGMENT DTD. 20.7.1999 PASSED BY THE MUNSIFF'S COURT, KOTTARAKKARA IN O.S.NO.185/1997.

EXT.P6: COPY OF ORDER DTD. 17.5.05 IN E.A.NO.92/2005 IN E.P.NO.25/2004 IN O.S.NO. 185/1997 OF THE MUNSIFF'S COURT, KOTTARAKKARA.

EXT.P7: COPY OF ORDER DTD. 17.5.2005 IN E.A.NO. 307/2004 IN E.P.NO. 25/2004 IN O.S.NO. 185/1997 OF THE MUNSIFF'S COURT, KOTTARAKKARA.

EXT.P8: COPY OF ORDER DTD. 17.5.2005 IN E.A.NO. 308/2004 IN E.P.NO. 25/2004 IN O.S.NO. 185/1997 OF THE MUNSIFF'S COURT, KOTTARAKKARA.

EXT.P9: COPY OF CLAIM PETITION DTD. DECEMBER 2004 AS 307/2004 IN E.P.25/04 IN O.S.185/97 OF MUNSIFF'S COURT, KOTTARAKKARA.

EXT.P10: COPY OF AFFIDAVIT AND PETITION DTD. 16.05.05 AS E.A.NO.92/05 IN E.P.NO. 25/04 IN O.S.185/97 OF THE MUNSIFF'S COURT, KOTTARAKKARA.

RESPONDENT'S EXHIBITS:

EXT.R1(a): COPY OF JUDGMENT DTD. 20.7.99 IN O.S.NO. 185/97 PASSED BY THE MUNSIFF'S COURT, AT KOTTARAKKARA.

EXT.R1(b): COPY OF OBJECTION FILED IN E.A.NO. 307/04 IN E.P.25/04 IN O.S.NO.185/97.

EXT.R1(c): COPY OF THE OBJECTION FILED IN E.A.308/04 IN E.P.25/04 IN O.S.185/97.

EXT.R1(d): COPY OF THE EXTRACT OF THE B-DIARY IN E.P.25/04.

EXT.R1(e): COPYOF THE ORDER DTD. 13.7.05 IN E.P.25/04 IN O.S.185/97 PASSED BY THE MUNSIFF'S COURT, KOTTARAKKARA.

//True copy//

PIUS C. KURIAKOSE, J.

W.P.(C) NO. 21923 of 2005

Dated this the 26th day of July , 2007

JUDGMENT

The grievance of the petitioner, whose claim petition under Order 21 Rule 58 of CPC (E.A. No.307/2004) was dismissed on the reason that E.A. No.92/2005 filed by him for stay of execution of the sale deed in favour of the first respondent was dismissed, is that the learned Munsiff did not adjudicate his claim petition at all. Ext.P6 is the order on E.A.No.92/2005 which was an application for staying the execution of the sale deed in favour of the first respondent who was the holder of a decree for specific performance of an agreement for sale of the subject property in his favour by the 2nd respondent. Ext.P1 is a copy of the sale document under which the petitioner claims to have obtained title and possession over the property. The same is dated 28.8.1996. Exts.P2 to P4 are respectively basic tax receipts and possession certificates which would show that on the basis of Ext.P1

mutation has been effected in the thandapper Registers in favour of the petitioner. Ext.P5 is the ex parte judgment passed in favour of the first respondent against the 2nd respondent. E.A.No.307/2004 was the petitioner's claim petition under Order 21 Rule 58 of CPC and Ext.P7 is the order dismissing that E.A. Ext.P8 is order on E.A. No.308/2004 which was filed by the petitioner for staying the execution proceedings. Exts.P7 and P8 will show that both the applications were dismissed by the learned Munsiff solely on the reason that Ext.P6 order is already passed.

2. This written petition is filed seeking quashment of Exts.P6, P7 and P8 and also for an order restraining execution of sale deed in favour of the first respondent on the strength of the decree in O.S. No.185/1997. Ext.P9 is a copy of E.A. No.307/2004 the claim petition. Ext.P10 is a copy of E.A. No.92/1995 which was dismissed as per Ext.P6. The 2nd respondent who was the sole defendant in the suit as already indicated did not contest the suit. In this court also he has not raised any contest though he was served with notice by paper publication.

3. I have heard very elaborate submissions addressed before me By Sri. T.K.M.Unnithan , the learned counsel for the petitioner and Sri.Dilip Mohan, the learned counsel for the first respondent. Sri.Unnithan would submit that under Order 21 Rule 58, when claim petitions are filed, the court is expected to adjudicate the claim as though the same was a suit itself. In the instant case, the claim petition was not adjudicated at all. What the learned Judge has done is to dismiss the claim petition on the only reason that the petition for staying the execution of the sale deed pursuant to the decree was dismissed. Mandates of Rule 58 of Order 21 have been violated by the learned Munsiff. According to Sri.Unnithan, the suit and the decree are the results of collusion between the respondents and of fraud played by both of them together. The agreement for sale itself was brought into existence for defeating the petitioner's interest in the property under Ext.P1. The petitioner is a bona fide purchaser for value at any rate, so submitted the learned counsel

4. Sri. Dilip Mohan, per contra, would submit that the agreement for sale relied on by the court for passing the decree was much prior to the deed of sale. The petitioner is not a bona

fide purchaser for value since the encumbrance certificate would have revealed existence of the agreement which is a registered one. In reply to the above submissions, Sri.Unnithan, the learned counsel for the petitioner invited my attention to the judgment of the Supreme Court in **Rambhau Namdeo Gajre v. Nrayan Bapuji Dhotra (2004 (3) KLT 728(SC)** and submitted that a mere contract for sale does not create any right or title in favour of the transferee. The transferee may get equity under Section 53A as shield against the action for eviction by the transferor such a right cannot be pressed into service against a third party.

5. I have heard the rival submissions made at the bar. Even though Sri.Dilip Mohan submitted that the agreement for sale pursuant to which the decree was passed by the court was a registered one, he was not able to convince me that the original of the agreement (copy of which he produced) was a registered one. The case of the petitioner that the agreement was brought into existence by fraud/collusion cannot therefore be ruled out without enquiry. The adjudication which is contemplated under Rule 58 of Order 21 on claim petitions is a full fledged

adjudication. Of course under given circumstances claim petition can be rejected also without adjudication. But I am of the view that the learned Munsiff was not justified in dismissing the claim petition on the only reason that the petition for stay is dismissed. The Claim petition E.A.No.307/2004 should have been enquired into by the learned Munsiff giving an opportunity to both the sides to adduce evidence.

Accordingly, I set aside all the three impugned orders and direct the learned Munsiff to enquire into E.A. No.307/2004 giving an opportunity to the parties to adduce whatever evidence they have on the same. The enquiry shall be completed and fresh orders shall be passed by the learned Munsiff as early as possible and at any rate within three months of receiving a copy of this judgment.

PIUS C. KURIAKOSE,

JUDGE.

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